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Pretrial Justice Reform in Harris County

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by

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Report

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Abstract

Pretrial Justice Reform in Harris County

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The University of Texas at Austin, 2015

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Criminal justice system officials in Harris County, Texas have a long history of managing jail population levels that meet or exceed the facility's capacity design. Pretrial detainees, inmates who have admitted to the jail but who have not been found guilty of a crime, comprise the majority of inmates at the jail and therefore consume the majority of the jail's beds. Research shows that pretrial detention leads to harsher sentences, compromises defendants' economic capacity and exacerbates any existing or underlying behavior health conditions. This policy analysis focuses on the failure of the county's criminal justice system officials to appropriately evaluate and manage defendants' risk of committing future crimes and failing to appear at court proceedings and suggests potential reforms for managing this population. This analysis also examines the policies that contribute to the county's reliance on pretrial detention, including a financial-based bail bond system, a lack of adequate defense at defendants' initial court appearance, and a lack of appropriately coordinated community-based alternatives for supervising defendants. The report identifies three potential reform options for appropriately

assessing and managing the risk of defendants and analyzes the feasibility of the county's criminal justice system stakeholders to implement them in order to maximize public safety and court appearance rates while expending minimal public resources to achieve those outcomes. These options include: 1) revise the bail schedule, 2) grant defendants earlier access to counsel, and 3) expand and enhance the capacity of the county's Pretrial Services Agency in order to provide appropriate community-based alternatives to pretrial detention.

Table of Contents

| | |
|--|------|
| List of Figures | viii |
| Introduction | 1 |
| Problem Statement | 4 |
| Chapter 1: Current Pretrial Justice System Trends in Harris County | 7 |
| Population Growth | 7 |
| Crime Reduction | 10 |
| Chapter 2: Harris County Criminal Justice System Authorities | 12 |
| Federal..... | 12 |
| State 13 | |
| County and Local | 15 |
| Law Enforcement..... | 15 |
| District Attorney | 16 |
| Pretrial Services Agency | 17 |
| Commissioners' Court | 17 |
| Chapter 3: Contributing Factors..... | 19 |
| Financial-Based Bail Bond System | 19 |
| Lack of Access to Pretrial Defense | 22 |
| Misapplied Community-Based Alternatives to Pretrial Detention | 24 |
| Chapter 4: Consequences of Pretrial Detention | 27 |
| Increased Likelihood of Harsher Sentencing Outcomes..... | 27 |
| Compromised Economic Capacity | 29 |
| Exacerbated Behavior Health Conditions | 30 |
| Chapter 5: Reform Options | 33 |
| Option 1: Revise the Bail Schedule | 33 |
| Advantages..... | 35 |
| Disadvantages | 36 |

| | |
|---|----|
| Option 2: Earlier Access to Counsel | 37 |
| Advantages..... | 37 |
| Disadvantages | 38 |
| Option 3: Enhance and Expand Community-Based Alternatives | 39 |
| Advantages..... | 40 |
| Disadvantages | 41 |
| Conclusion | 42 |
| References | 43 |

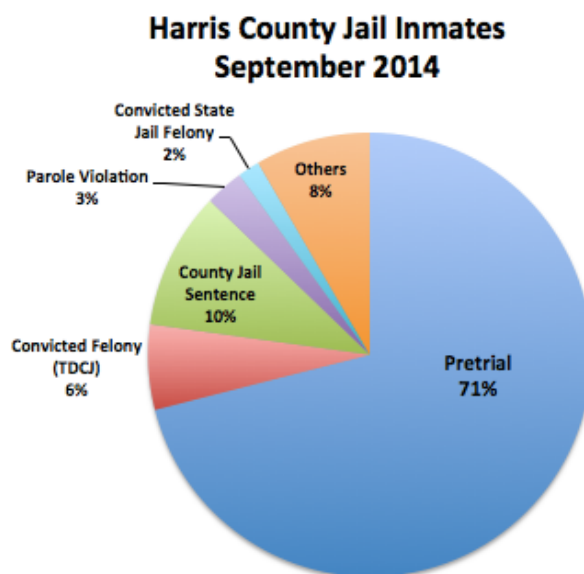
List of Figures

| | |
|---|----|
| Figure 1: Composition of Harris County Jail inmates in September 2014 | 1 |
| Figure 2: Total In-Custody Population at the Harris County Jail 2009-2013 | 8 |
| Figure 3: Pretrial Inmates at the Harris County Jail (2000-2012) | 9 |
| Figure 4: Harris County Violent and Property Crime Rate (2000-2011) | 10 |
| Figure 5: Harris County General Fund Expenditures FY 2002 v. FY 2012 | 11 |

Introduction

The majority of people in the Harris County Jail have not been found guilty of a crime. In September 2014, 71% of the 8,713 Harris County jail inmates were detained pretrial, consuming the majority of the jail's beds.¹ *Figure 1* shows the composition of the jail's inmates during that month.

Figure 1: Composition of Harris County Jail inmates in September 2014



Pretrial detainees are defendants who have been arrested, have not been found guilty of a criminal offense, but who have not met judicial eligibility requirements for pretrial release before disposition of the criminal charges against them. Current law requires magistrates and judiciaries of the county and district courts to ensure defendants appear at disposition hearings and ensure the future safety of the public before their charges have

¹ Texas Commission on Jail Standards. "September 2014 Population Report" (2014), <http://www.tcjs.state.tx.us/docs/AbbreviatedPopReports/Abbreviated%20Pop%20Rpt%20Sept%202014.pdf>

been disposed.² To fulfill this mandate, each time a person is arrested and charged with a crime, the Harris County judiciary must decide whether the defendant should be detained in custody at the county jail or be released back into the community pending trial. Harris County's long history of managing jail population levels that meet or exceed capacity design make judges' pretrial decisions particularly relevant to the county's historic challenges maintaining a population level that adheres to state standards, providing constitutionally adequate conditions to inmates, and controlling the costs of the county's criminal justice system.³

This report analyzes the failure of the county and district court judiciary in Harris County to make risk-based decisions for determining whether a defendant should be detained at the county jail or released into the community before their cases have been disposed. This analysis examines the policies that contribute to county and district court judges' current pretrial decision-making process, including a financial-based bail bond system, a lack of adequate defense at defendants' initial court appearance, and a lack of appropriately coordinated community-based alternatives to pretrial detention for supervising defendants. All three factors contribute to judges' reliance on pretrial detention for defendants that cannot afford to post bond. Finally, the report identifies three potential reform options and analyzes the feasibility of the county's criminal justice system officials to implement them in order to maximize public safety and court appearance rates while expending minimal public resources to achieve those outcomes. Each of the three reform options proposed in this policy analysis identifies methods for

² State of Texas Constitution. Article 17, Section 15 (Art. 17.15). Magistrates preside over defendants' initial probable cause hearing that occurs within 12 hours of a defendant's arrest; bail is also set at this hearing.

³ The history of the litigation is chronicled in several opinions of the United States Court of Appeals for the Fifth Circuit. See: *Alberti v. Sheriff of Harris County*, Civ. A. No. 72-H-1094, U.S. District Court, S.D. Texas (Dec 16, 1975); *In re Clements*, 881 F.2d 145 (5th Cir., 1989); *Alberti v. Sheriff*, 937 F.2d 984 (5th Cir., 1991); *Alberti v. Klevenhagen*, 46 F.3d 1347 (5th Cir., 1995).

appropriately assessing and managing the risk of defendants during pretrial status. These options include: 1) revise the bail schedule, 2) grant defendants earlier access to counsel, and 3) increase the distribution of personal bonds by developing a pretrial release program that enhances and expands community-based alternatives to detention.

Problem Statement

A financial-based bail bond system, a lack of access to defense counsel at a defendant's initial hearing, and a lack of community-based supervision alternatives impede the ability of county and district court judges in Harris County to make risk-based decisions to determine a defendant's pretrial status, increasing their reliance on pretrial detention for managing defendants' risk of committing future crimes and of failing to appear at their case proceedings. In a county whose violent and property crime rate have decreased by 33% and 23%, respectively, over the last decade,⁴ the number of defendants detained pretrial more than doubled over the same period.⁵ Without appropriate evaluation and effective supervision services, the county's magistrates and judges are likely to make pretrial release or detention decisions without access to data on defendants' criminogenic needs, which are the factors that are predictive of an individual's propensity to commit future crime. Research shows that, for defendants, pretrial detention leads to harsher sentencing outcomes, compromised economic capacity, and exacerbates any existing or underlying behavior health conditions.

The vast majority of defendants can be better served in their communities during the pretrial phase, where supervision is cheaper and leads to better outcomes. Research shows that 53-67% are low-risk defendants, and if released before trial, are unlikely to commit future crimes and are likely to return to court for their case proceedings. Others, 29-40% of defendants, present moderate risks that can often be managed in the community through supervision, monitoring, or other interventions. Only a small portion of this population is at a high-risk of failing to appear for their court proceedings or have

⁴ Federal Bureau of Investigations (FBI), "Unified Crime Report," (2012), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012>.

⁵ Texas Commission on Jail Standards (TCJS), "Monthly Population Reports," <http://www.tcjs.state.tx.us/index.php?linkID=326>.

many unaddressed criminogenic needs that make them a high risk of being rearrested before their case is adjudicated.⁶ Therefore, to appropriately address the risk this population poses to public safety and to the county's court resources, Harris County must address two seemingly goals: creating incentives to release low- and moderate-risk defendants through community-based services while still ensuring the appropriate use of pretrial detention for defendants who are at a high-risk of committing future crimes and failing to appear at their court proceedings.

The problem is that the county's financial-based bail schedule that magistrates use to determine defendants' eligibility for pretrial release prioritizes the severity of the offense for which defendants were arrested and their previous criminal history to determine their pretrial risk, regardless of the age of previous offenses or whether the defendant already paid their debt to society for those offenses. These variables do not encompass all of the factors that are used to determine an individual's criminogenic risk. Harris County can address the rate at which defendants are detained pretrial by revising the bail schedule to reduce bond amounts for non-violent offense categories and to account for the age of a defendant's previous offenses.

The county also fails to provide defendants with defense counsel at their initial hearing when a magistrate determines probable cause and sets a defendant's bond amount. Without legal representation, defendants are more likely to receive bond amounts that they cannot afford, increasing the likelihood of their continued detention at the Harris County Jail. To reduce the number of defendants detained pretrial and the length of time defendants are detained, the county can ensure defendants' access to

⁶ Christopher T. Lowenkamp, Marie VanNostrand, and Alexander Holsinger, "Hidden Costs of Pretrial Detention," Laura and John Arnold Foundation (LJAF), (2013), http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_hidden-costs_FNL.pdf.

defense council at their initial appearances before a magistrate, when their bond is set, to reduce the likelihood that low- and moderate-risk defendants are detained pretrial.

And for low- and moderate-risk defendants, Harris County lacks community-based alternatives to pretrial detention. Expanding and enhancing the county's Pretrial Services Agency could help the county ensure that this population of defendants has access to effective supervision, reducing the likelihood of future crimes and failure to appear at their court proceedings. The agency's caseworkers could also administer an evidence-based pretrial risk assessment tool to ensure that defendants' risk is appropriately evaluated, and judges could use the results of this assessment to apply appropriate pretrial supervision that addresses defendants' risk of nonappearance and criminogenic needs. This reform would increase the likelihood that pretrial justice system officials provide supervision services that adequately address the risk-level of defendants.

Chapter 1: Current Pretrial Justice System Trends in Harris County

There are two current trends that present challenges to the county's criminal justice system officials: 1) the growth of the general population in Harris County, and 2) the changes in the county's crime rates. While these trends are often attributed to the fluctuations in the county's jail population, policy changes are responsible for the county's historic jail population growth. Criminal justice system officials are responsible for maintaining a constitutionally adequate pretrial justice system that ensures defendants right to a presumption of innocence while also maintaining public safety. This chapter examines the current pretrial justice system trends in Harris County in order to better understand the policy issues that impede the ability of justice system officials from making risk-based decisions about a defendant's eligibility for pretrial release.

POPULATION GROWTH

Harris County is a large county with approximately 4.1 million residents,⁷ and the Harris County jail system is one of the largest jail systems in the United States, third behind Los Angeles (CA) and Cook (IL) counties.⁸ The jail system has four buildings that were constructed between the 1980s and the 1990s, and together they have a capacity of 9,434 inmates.⁹ Both the county's residential population and the county's jail population increased over the last four decades. However, the county's residential population increased by 17% between 2000 and 2008 and the county's jail population

⁷ United States Bureau of the Census, *2010 Census*, <http://www.census.gov/2010census/>.

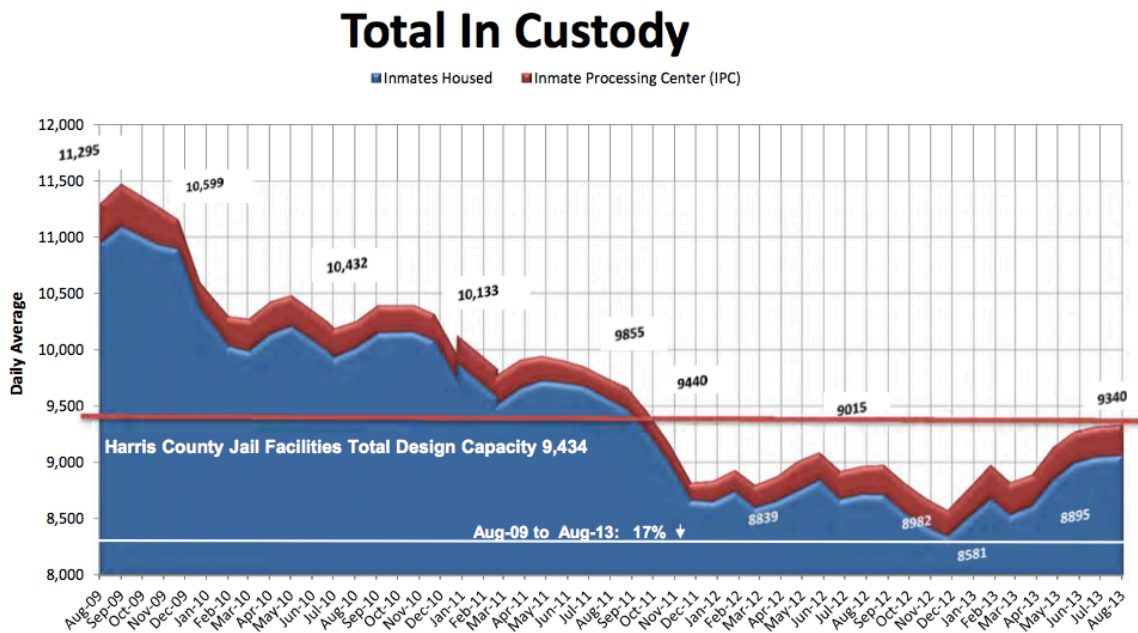
⁸ Harris County Sheriff's Office (HCSO), www.harriscountyso.org.

⁹ Barry Mahoney and Elaine Nugent-Borakove. "Harris County Criminal Justice System Improvement Project: Phase 1 Report," The Justice Management Institute (JMI), (2009), 4; <http://www.jmijustice.org/resources/casflow-management/harris-county-criminal-justice-system-improvement-project-phase-1-report/view>.

increased by over 30% during the same period.¹⁰ Therefore, the increase in the county's jail population is not solely attributable to the country's residential population growth.

The average daily population grew substantially from 2005-2009 and peaked at nearly 11,500 inmates in September 2009; much of this increase was in the population of pretrial felony detainees, which increased by 52% from 4,674 to 7,099 from April 2005 to September 2009.¹¹ Since 2009, the average daily jail population decreased to a level below capacity, reaching a low of 8,581 in December 2012. However, between December 2012 and August 2013, the number of inmates detained at the jail increased again to 9,340 inmates, largely due to an increase in pretrial detainees. *Figure 2* shows these changes in the overall jail population.

Figure 2: Total In-Custody Population at the Harris County Jail 2009-2013¹²



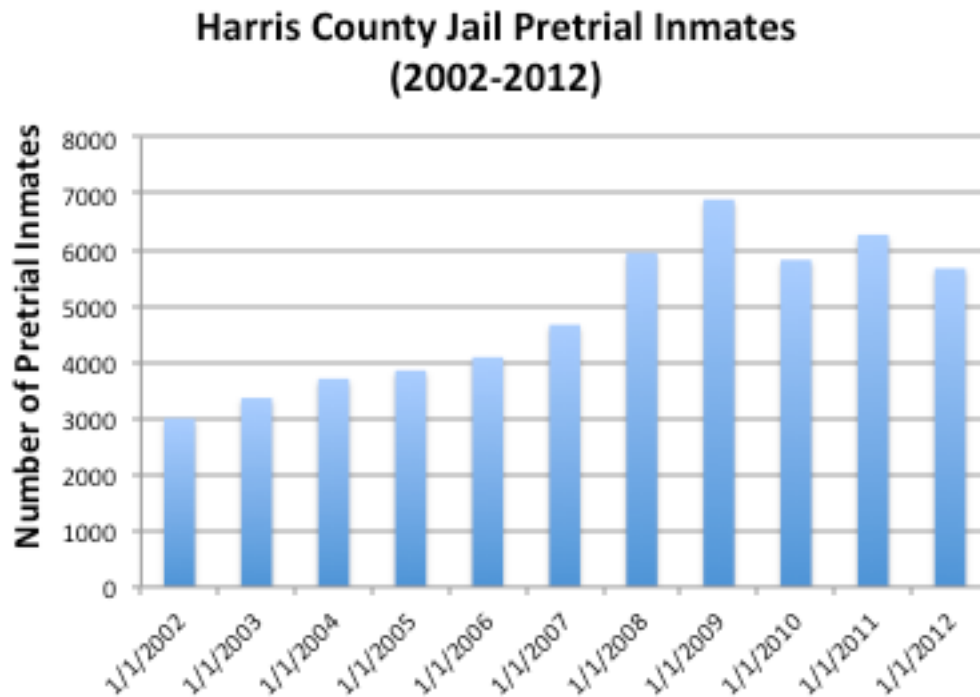
¹⁰ *Ibid.*

¹¹ Mahoney and Nugent-Borakove, "Harris County Criminal Justice System Improvement Project: Phase 1 Report."

¹² Harris County Office of Criminal Justice Coordination, "Jail Population Report," (August 2013), emailed to author by Judge Caprice Cosper.

The fluctuations in pretrial felony detainees are due, in large part, to changes to low-level drug and DWI felony case filings by the county's District Attorney.¹³ Figure 3 shows the parallel growth in the pretrial detainee population.

Figure 3: Pretrial Inmates at the Harris County Jail (2000-2012)



Therefore, the majority of inmates at the Harris County Jail have not been found guilty of a criminal offense, yet are exposed to the jail's historically inadequate conditions.¹⁴ In order to address the historic jail population level trends, Harris County criminal justice officials need to examine the policies that impact the pretrial detainee population.

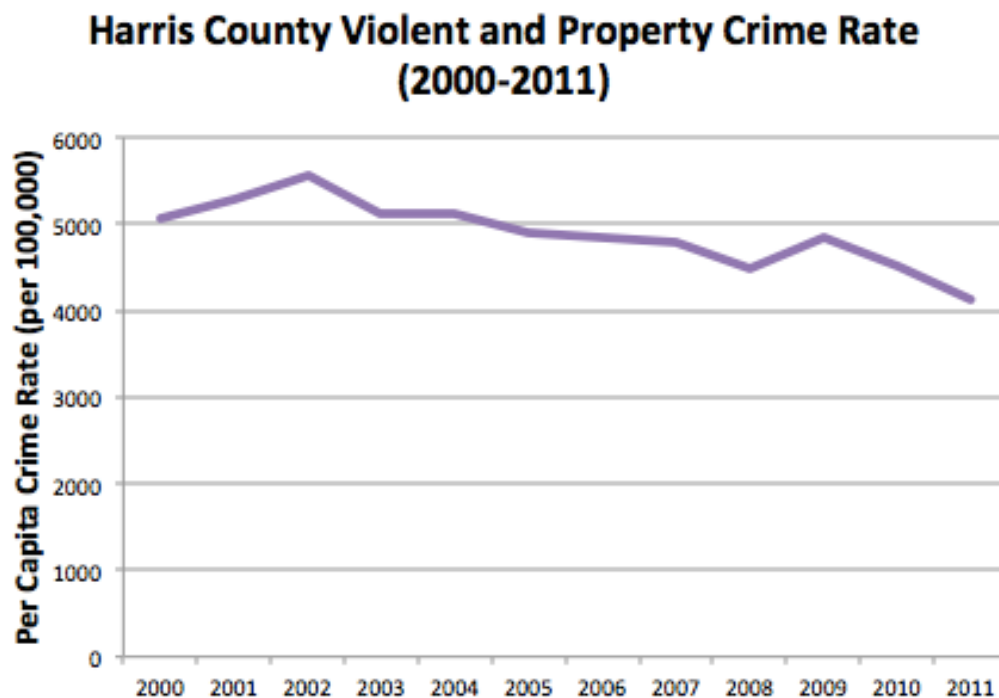
¹³ House Committee on Corrections, 81st Texas House of Representatives, "Public Testimony," 2010, <https://www.tsl.texas.gov/arc/findingaids/recordsfindingaids.html>.

¹⁴ United States Department of Justice (DOJ) Civil Rights Division. Letter to The Honorable Ed Emmett (June 4, 2009), http://www.justice.gov/crt/about/spl/documents/harris_county_jail_findlet_060409.pdf

CRIME REDUCTION

While the population of pretrial felony detainees increased by 52% from April 2005 to September 2009, the county's violent and property crime rates decreased over the same period.¹⁵ *Figure 4* (below) shows the reduction in crime rates over the last decade. Although crime rates have decreased nationally, jail populations have risen, in part because of the practice of incarcerating defendants prior to trial.¹⁶ These policy changes have resulted in the increased detention of pretrial inmates, as shown in *Figure 3: Pretrial Inmates at the Harris County Jail (2000-2012)* (above):

Figure 4: Harris County Violent and Property Crime Rate (2000-2011)



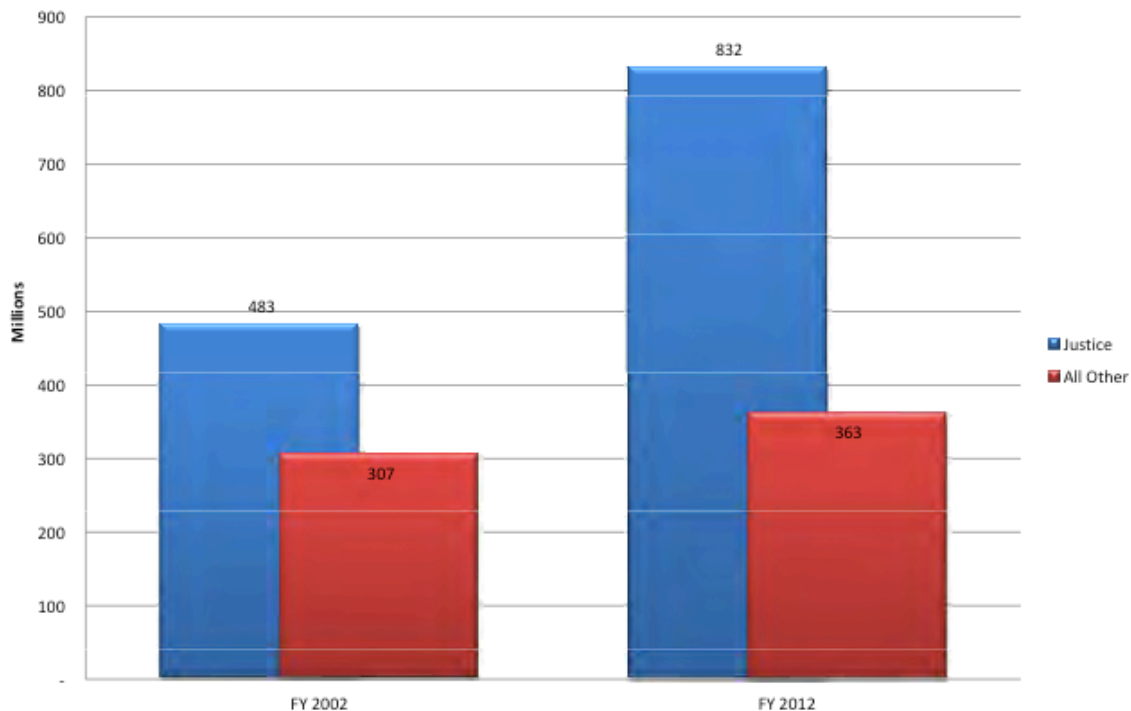
¹⁵ Mahoney and Nugent-Borakove, "Harris County Criminal Justice System Improvement Project: Phase 1 Report."

¹⁶ The Pretrial Justice Institute, "Rational and Transparent Bail Decision Making," MacArthur Foundation (2012), <http://www.pretrial.org/devsite/download/featured/Rational+and+Transparent+Bail+Decision+Making.pdf>; see also Laura I. Appleman, "Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment," *Washington & Lee Law Review*, 69, 3. 2012: 1297-1311, <http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4288&context=wlulr>.

Because the county's crime rate decrease does not reflect a cause relationship with the growth in the number of pretrial defendants, criminal justice system officials need to examine the policies that impact the detention of defendants in order to reduce the costly use of jail beds. *Figure 5* shows the growth in the costs associated with the increased use of pretrial detention:

Figure 5: Harris County General Fund Expenditures FY 2002 v. FY 2012¹⁷

Harris County General Fund Expenditures (in \$millions) FY 2002 v. FY 2012



Harris County criminal justice system officials need to reform the policies that contributed to an increase in the pretrial population in order to ensure that the use of justice system resources produce at least as much return to county taxpayers.

¹⁷ Harris County Office of Criminal Justice Coordination, "Jail Population Report," (August 2013), emailed to author by Judge Caprice Cosper.

Chapter 2: Harris County Criminal Justice System Authorities

Harris County's pretrial justice system is made up of a complex network of multiple criminal justice decision-makers that have a role in the decision to release or detain defendants. Judicial officers, prosecutors, defense attorneys, county commissioners, pretrial services officers, law enforcement officers, including the Harris County Sheriff and his jail administrators, inform pretrial release and detention policies and practices. Professional associations and government at the federal, state and local levels monitor and oversee jail operations through established jail standards and inspection programs.¹⁸ These standards and inspection programs include enforcing adequate use of jail beds at the jail and are used to report on the criminal justice system officials' performance for the public. Public reports are important because, as elected officials, they are accountable to the residents of Harris County.

FEDERAL

The United States Department of Justice (DOJ) monitors and inspects the country's prisons and jails, ensuring the conditions at these facilities meet the constitutional rights of inmates at these facilities, as defined by relevant case law.¹⁹ For example, the *Alberti* lawsuit, initiated by Harris County inmates against the Sheriff and the Commissioners Court, led to a consent decree filed in February 1974 under which the county agreed to bring the jail facilities and operations into compliance with federal and state standards. Several months later, in response to the plaintiffs' contentions that the county's plans for upgrading the conditions were inadequate, the federal court issued an

¹⁸ United States Department of Justice (DOJ), "Jail Standards and Inspection Programs," (2007), <https://s3.amazonaws.com/static.nicic.gov/Library/022180.pdf>.

¹⁹ *Farmer*, 511 U.S. at 832.

opinion finding that conditions in the jail facilities were “inhumane,”²⁰ with over 2,500 inmates confined in facilities designed to hold approximately 1,150 inmates. The decree called for renovation of existing jail facilities, development of a new central jail, improvements in staffing and security at the jail, and establishment of both a pretrial services agency that would have prompt access to newly arrested inmates and a system for prompt judicial review of probable cause for continued detention.²¹ The federal court retained jurisdiction over the case, and over the next twenty years became involved in a series of reviews of conditions as the jail population repeatedly exceeded the design capacity of the jail facilities even as the county opened new facilities.

The DOJ does not define a minimum standard for the number of inmate deaths at the county jails, but the DOJ collects data on inmate mortality in U.S. jails and reports this information to the public. Each year, over 80% of the approximately 3,000 jail jurisdictions participating in the Deaths in Custody Reporting Program report no prisoner deaths, and just over 40% reported no prisoner deaths during the entire 8-year period covered by the report.²² According to the Bureau of Justice Statistics (BJS), the states with the largest jail populations, including Texas, contributed to the majority of jail deaths.²³

STATE

The Texas Commission on Jail Standards (TCJS) is responsible for implementing a state policy that all county jail facilities conform to minimum standards of construction

²⁰ *Alberti v. Sheriff of Harris County*, Civ. A. No. 72-H-1094, U.S. District Court, S.D. Texas (Dec 16, 1975).

²¹ *Ibid.*

²² United States Department of Justice (DOJ) Bureau of Justice Statistics (BJS). “Percent of local jail inmate deaths in the U.S., by cause of death, 2000-2011,” <http://www.bjs.gov/content/dcrp/tables/dcst07lj1.pdf>.

²³ *Ibid.*

maintenance and operation, care and treatment of inmates.²⁴ The Legislature of the state of Texas developed TCJS in 1975 and it enforces the agency's practices through annual reporting requirements and the Legislature's sunset review process.²⁵ The Governor appoints Commission members.²⁶ TCJS is the regulatory agency for all county jails and privately operated municipal jails in the state. It assists local governments in providing safe, secure and suitable local jail facilities by establishing professional standards for jail operations and conducting on-site inspections of jail facilities, including the jail population level.²⁷ TCJS has the authority to grant county jails variance beds, temporary beds, upon the request of the county Sheriff, and will not grant the Sheriff's request if TCJS decides that the temporary beds would permit or create unhealthy, unsanitary, or unsafe conditions or otherwise jeopardize the security or supervision of inmates or the programs and services required by law or rule of the commission.²⁸ However, TCJS is not responsible for appropriating public funds to the HCSO for jail operations. That responsibility is reserved for the Harris County Commissioners Court, which is discussed in greater detail in the next section.

Texas Minimum Jail Standards do not include a standard that identifies appropriate jail population levels, rather, these standards encompass over 600 standards that county jails are required to follow at all population levels.²⁹ Both large and small jails are designed to carry out the same basic functions, so neither large jails nor small

²⁴ Texas Revised Civil Statutes, Title 81, Article 5115.1 (1975); *See also*: Official Website of Texas Commission on Jail Standards (TCJS), <http://www.tcjs.state.tx.us/index.php?linkID=110>.

²⁵ Texas Commission on Jail Standards (TCJS), "Report to the 81st Legislature" (February 2009). <http://www.sunset.state.tx.us/81streports/final81st/85.pdf>.

²⁶ Texas Commission on Jail Standards (TCJS), *Report on Local Jails*, <http://www.tcjs.state.tx.us/docs/Final%20DraftTJSbu.pdf>.

²⁷ *Ibid.*

²⁸ Texas Administrative Code §299.4. Title 37, Part 9, Chapter 299, Section 299.4, "Burden."

²⁹ Adan Muñoz. "Agency Briefing interim Charge #4 Prepared for the Texas Senate Committee on Criminal Justice." Texas Commission on Jail Standards (September 2010).

jails are inherently better than the other. However, according to TCJS, the number of inmates housed in a county jail is the single most important factor in jail and criminal justice system analysis.³⁰ While every jail is required to follow minimum standards for operation, the ability of a jail to meet these standards is impacted by the number of inmates it is required to manage. For example, the number of inmates at a jail impacts the jail's budget. The more inmates that are housed at the jail, the more resources are needed to meet minimum state jail standards. Therefore, TCJS accounts for the size of a jail when it interprets whether a county jail has met minimum standards.

COUNTY AND LOCAL

At a defendant's initial hearing, a county magistrate decides to detain or release a defendant. A magistrate is a judicial officer of the court appointed to assist District and County Criminal Court judges in the performance of duties. Magistrates oversee Preliminary Initial Appearances of criminal defendants, set bail, and conduct other administrative duties.³¹ The information gathered by police at the time of arrest, the District Attorney's office, and the Pretrial Services Agency informs a magistrate's decision to release or detain a defendant pretrial.

Law Enforcement

The Harris County Sheriff's Office (HCSO) is the third largest sheriff's office in the country, employing approximately 4,200 officers across ten bureaus.³² As the county's jail administrator, the Harris County Sheriff is responsible for managing the

³⁰ Texas Commission on Jail Standards (TCJS), *Report on Local Jails*, <http://www.tcjs.state.tx.us/docs/Final%20DraftTJSbu.pdf>.

³¹ Rules of the Judicial District Courts of Harris County. "Rules of the Judicial District Courts of Harris County." Rule 6.12 <http://www.justex.net/courts/criminal/LocalRules.aspx>.

³² Harris County Sheriff's Office (HCSO) website, http://www.harriscountyso.org/about_us.aspx; the ten bureaus are: Executive, Patrol, Patrol Support Services, Detective, Public Services, Detentions, Field Operations Support, Human Resources, Support Services and Homeland Security.

daily operations of the county jail, which is the primary responsibility of the Detention Bureau.³³ The Patrol Bureau is responsible for maintaining public safety by enforcing the law in the unincorporated areas of the county, which are the areas outside a municipality located inside the county boundaries.³⁴ The HCSO deputies patrol some municipalities as well, pursuant to contracts with those jurisdictions. In Harris County, there are more than 130 police agencies, any of which are authorized to make an arrest or issue a citation that will initiate a criminal case.³⁵ For example, the Houston Police Department (HPD) is responsible for initiating approximately 60% of the misdemeanor and felony cases that involve booking defendants into the Harris County Jail.³⁶

District Attorney

The county's District Attorney's office is the first office to review a police report of the defendant's arrest. When a patrol officer arrests a defendant, the officer calls the District Attorney's office and gives a report of the offense. An Assistant District Attorney (ADA) reviews the report and decides the appropriate charges to file. Then, the ADA identifies the defendant's criminal history and indicates a bond amount according to the bond schedule developed by the District Courts and the County Criminal Courts at Law. The bond amounts on the bail schedules are based solely on the level of the charge against a defendant and the defendant's criminal history. Only a judicial officer can approve a different bond amount than the one indicated on the bail schedule, which usually happens at defendant's initial hearing. Once the ADA's office sets the initial bond amount, a defendant can post the bond amount before seeing a judicial officer.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Mahoney and Nugent Borakove. "Harris County Criminal Justice System Improvement Project: Phase 1 Report."

³⁶ *Ibid.*

Therefore, those defendants that bond out of jail directly are not assessed for their risk of nonappearance or their risk of committing a crime prior to their case being adjudicated.

Pretrial Services Agency

The agency's Pretrial Services officers conduct interviews of pretrial defendants immediately after they are arrested. Officers located at two Houston Police Department facilities and the Harris County Jail's Inmate Processing Center interview defendants arrested on felony charges or Class A or B misdemeanors. The officers collect information related to the risk of a defendants' nonappearance or of committing a crime if they are released pretrial. The Pretrial Services officers compile the information into a Defendant Report and provide that report to the magistrate at a defendant's initial hearing. The report summarizes the information collected during the interview and generates a "Risk Assessment Score," a numeric value that represents the likelihood of a defendant's nonappearance at court hearings and the likelihood of committing a crime if released pretrial. At defendants' initial hearing, the magistrate may use the information to decide defendants' bond amount or to release them on their own recognizance. However, not all defendants are interviewed because some have already posted bond, and therefore, have not been assessed for their risk of flight or of re-offense.

Commissioners' Court

The Harris County Commissioners' Court is mandated to provide safe and suitable jails for the county.³⁷ As the county-level legislative branch of government, the Commissioners' Court approves the budgets of elected officials offices, including the HCSO's annual budget for the county jail.³⁸ The Sheriff retains control over the HCSO's

³⁷ State of Texas Local Government Code, Chapter 351 Subchapter A: County Jail Facilities, <http://www.statutes.legis.state.tx.us/SOTWDocs/LG/htm/LG.351.htm>.

³⁸ Official Website of the Harris County Commissioners' Court: www.harriscountytexas.gov.

respective operations, however the amount of funding available to the Sheriff for operating expenses impacts the HCSO's ability to ensure inmates' safety and health at all jail population levels. For example, in 2010, the Harris County Commissioners Court enacted a hiring freeze for all county-level positions in response to a countywide budget shortfall for the fiscal year.³⁹ The freeze resulted in a shortage of detention officers and violated the state standard that requires county jails maintain an established staff to inmate ratio, increasing the risk of harm to an inmate. Budget freezes may not provide the HCSO with the flexibility it needs to provide safe and healthy conditions for inmates at all population levels. The County Commissioners Court also approves funding for the county's Pretrial Services Agency.

³⁹ Charles Kuffner, "Interview with Sheriff Adrian Garcia," *Off the Kuff* (February 1, 2012). <http://offthekuff.com/wp/?p=42800>.

Chapter 3: Contributing Factors

Three policy issues contribute directly to the failure of the county and district court judiciary in Harris County to make risk-based decisions for determining whether a defendant should be detained at the county jail or released into the community before their cases have been disposed: 1) a financial-based bail bond system, 2) a lack of defense counsel at defendants' initial hearing, and 3) a lack of appropriately coordinated community-based alternatives for supervising defendants. These three policy issues increase judges' reliance on pretrial detention for supervising defendants that cannot afford to post bond.

The length of stay for pretrial inmates varies based on an inmate's category of offense. On average, people charged with misdemeanors are detained for a shorter period of time than people charged with felonies.⁴⁰ In 2012, the average cost to Harris County taxpayers to incarcerate the entire Harris County jail pretrial population of inmates was \$333,645, per day: \$22,420 for defendants with misdemeanor charges, \$38,232 for defendants with state jail charges, and \$272,993 for defendants with felony charges.⁴¹

FINANCIAL-BASED BAIL BOND SYSTEM

The judiciary's reliance on a financial-based bail schedule for deciding defendants' pretrial status impedes their ability to adequately assess the risk of defendants committing future crimes and failing to appear at their court proceedings. "Bail" is the security given by the accused that they will appear before the proper court and answer to the charges against them, and "bond" is the agreement between a defendant and the

⁴⁰ Mahoney and Nugent-Borakove, "Harris County Criminal Justice System Improvement Project: Phase 1 Report."

⁴¹ Texas Criminal Justice Coalition, "Harris County, Texas: Adult Criminal Justice Data Sheet" (2012); http://countyresources.texascjc.org/sites/default/files/adult_county_data_sheets/TCJC%27s%20Adult%20Harris%20County%20Data%20Sheet.pdf.

county or district court judge that the defendant will abide by the conditions of their release that they appear at their court proceedings and do not engage in future criminal activity.⁴² There are three types of bonds that current law authorizes judges to distribute to defendants: cash, surety, and personal bonds.⁴³ Under cash or surety bonds, judges require defendants post a monetary security in order to be eligible for pretrial release, usually a payment of 10% of the bond amount.⁴⁴ The majority of defendants in Harris County are offered a cash or surety bond, rather than a no-cost personal bond that authorizes judges to release defendants, pretrial, on their own recognizance.⁴⁵ In 2013, 84.5% of the almost 42,000 defendants who judges released on bond posted a cash or surety bond.⁴⁶ This system relies on defendants' ability to pay the amount required by the bail schedule in order to be eligible for pretrial release; however, according to the National Association of Pretrial Services Agencies (NAPSA), the ability to pay a bondsman through a cash or surety bond is unrelated to the risk of flight or danger to the community.⁴⁷

For cash or surety bonds, judges use a bail schedule to determine the amount of money a defendant is required to post. The bail schedule uses only two variables to determine the amount a defendant must pay in order to be eligible for pretrial release: 1)

⁴² *Ibid.*

⁴³ Texas Code of Criminal Procedure Chapter 17; Bail, <http://www.statutes.legis.state.tx.us/Docs/CR/htm/CR.17.htm>.

⁴⁴ Cherise Fanno Burdeen, "Jail Population Management: Elected County Officials' Guide to Pretrial Services," National Association of Counties (2009), <http://www.naco.org/newsroom/pubs/Documents/Health,%20Human%20Services%20and%20Justice/Jail%20Population%20Management%20Guide.pdf>.

⁴⁵ Harris County Pretrial Services 2013 Annual Report, <http://www.harriscountytexas.gov/CmpDocuments/59/Annual%20Reports/2013%20Annual%20Report.pdf.pdf>.

⁴⁶ *Ibid.*

⁴⁷ National Association of Pretrial Services Agencies (NAPSA), *Standards on Pretrial Release*, 3rd edition (October 2004). <http://www.pretrial.org/download/performance-measures/napsa%20standards%202004.pdf>.

the severity of the offense for which a defendant was arrested, and 2) a defendant's criminal history, regardless of the age of the previous offenses or whether a defendant has already paid their debt to society for those offenses.⁴⁸ Under a financial-based bail bond system, these variables, as well as a defendant's ability to pay, become the primary factors used to determine defendants' current risk of flight or rearrest, not defendants' unaddressed criminogenic needs, which are predictive of an individual's propensity to commit future crime.

According to the American Bar Association (ABA), an evidence-based risk assessment tool that evaluates several aspects of a defendant's life and background, including their criminal history, employment status, family stability, and prior substance abuse, are more predictive factors of a defendant's risk of flight or of committing future crimes.⁴⁹ For example, defendants who are economically secure with a familial structure are more likely to appear at subsequent court dates.⁵⁰ Harris County's Pretrial Services Agency conducts a pretrial interview that assesses defendants' risk of pretrial misconduct by asking questions about these factors. Pretrial officers prepare a risk-assessment report for the magistrate at a defendant's initial appearance.⁵¹ Magistrates at the county criminal and district courts are supposed to use these reports to identify mitigating factors that could inform their decision to assign a higher or lower bond amount or grant a personal

⁴⁸ Rules of the Judicial District Courts of Harris County, "Rules of the Judicial District Courts of Harris County."

⁴⁹ American Bar Association (ABA), *Criminal Justice Standards for Pretrial Release*, 2007; http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf.

⁵⁰ American Bar Association (ABA), *State Policy Implementation Project*, 2011, http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_handouts.authcheckdam.pdf.

⁵¹ Rules of the Judicial District Courts of Harris County, "Rules of the Judicial District Courts of Harris County."

bond.⁵² However, the county's Pretrial Services Agency does not use an evidence-based risk-assessment tool for assessing defendants' pretrial risk-level, but rather a tool that was developed internally.⁵³ Therefore, the tool's efficacy for predicting a defendant's risk of appearing at court or committing future crimes is not statistically verifiable.

The agency's pretrial officers conduct interviews for defendants booking into the Harris County Jail, so not all defendants receive a risk assessment and not all judges receive the agency's risk assessment reports. Under the county's direct case filing system, a law enforcement officer submits an arrest report to the District Attorney's office. Assistant District Attorneys (ADAs) use the bail schedule to assign an initial bond amount based on the charge for which a defendant was arrested and their criminal history.⁵⁴ Defendants that can immediately post the bond amount before they are booked into the jail do not receive a risk-assessment.⁵⁵ This process relies heavily on defendants' ability to pay the assigned bond amount, and may not identify defendants who have a high risk of committing future crimes or failing to appear for their court proceedings.

LACK OF ACCESS TO PRETRIAL DEFENSE

A lack of access to defendants' pretrial defense is the second factor that contributes impedes judges' ability to adequately assess the risk of defendants committing future crimes and failing to appear at their court proceedings. Current law does not require Harris County defendants to be represented by defense counsel at their initial hearing, which is used to determine probable cause for the charges against them and for setting bail, even though a magistrate, the defendant, and a prosecuting attorney

⁵² *Ibid.*

⁵³ Harris County Pretrial Services. *2013 Annual Report*.

⁵⁴ Rules of the Judicial District Courts of Harris County, "Rules of the Judicial District Courts of Harris County."

⁵⁵ *Ibid.*

are present.⁵⁶ Pretrial justice system officials only begin securing a defendant's access to counsel after the magistrate, at the defendant's initial hearing, confirms a defendant's intention to hire an attorney for court proceedings for their criminal case.⁵⁷ Unless a defendant hires an attorney in the 12 hours between their arrest and initial appearance, that defendant does not have legal representation when the county's judiciary determines probable cause and officially sets their bond amount.⁵⁸ Without the advice from counsel, defendants are likely to accept a hearing officer's determination without challenge, despite their inability to afford the set bond amount, because most defendants lack the legal knowledge necessary to advocate for a magistrate changing their bond amount. For example, in 2012, Harris County magistrates set bail in an amount lower than that called for in the bail schedule in 3,400 cases out of the 74,000 probable cause hearings that year, which is just fewer than 5% of cases.⁵⁹

Defendants' access to defense counsel at their initial appearance before a magistrate is also important because Harris County's Court Rules allow for prosecutors to present relevant information for requesting a magistrate increase or decrease a defendant's bond amount.⁶⁰ However, prosecutors have no obligation or incentive for decreasing a defendant's bond amount, only increasing it, compromising the ability of defendants to post a bond for pretrial release. Research shows that defendants detained in

⁵⁶ Texas Code of Criminal Procedure, Article 15.17, <http://www.statutes.legis.state.tx.us/Docs/CR/htm/CR.15.htm>.

⁵⁷ Rules of the Judicial District Courts of Harris County, "Rules of the Judicial District Courts of Harris County," noting that a hearing officer is known commonly as the judge presiding over the defendant's initial court appearance.

⁵⁸ Mahoney and Nugent-Borakove, "Harris County Criminal Justice System Improvement Project: Phase 1 Report," 20.

⁵⁹ Harris County Pretrial Services. *2012 Annual Report*, <http://www.harriscountytexas.gov/CmpDocuments/59/Annual%20Reports/2012%20Annual%20Report.pdf>.

⁶⁰ Rules of the Judicial District Courts of Harris County, "Rules of the Judicial District Courts of Harris County."

jail while awaiting trial plead guilty more often, are convicted more often, are sentenced to prison more often, and receive harsher prison sentences than those who are released during the pretrial period.⁶¹ Therefore, the higher the bail amount, the more likely the defendant will not be able to post bond and will be detained at the jail, and the more likely the prosecution will succeed at obtaining a guilty verdict. Prosecutors lack the incentive to ensure a judge's pretrial decision is reflective of a defendant's risk of appearing for their court proceedings or of committing future crimes.

MISAPPLIED COMMUNITY-BASED ALTERNATIVES TO PRETRIAL DETENTION

A lack of access to defendants' pretrial defense is the second factor that contributes impedes judges' ability to adequately assess the risk of defendants committing future crimes and failing to appear at their court proceedings. The county's Pretrial Services Agency is responsible for monitoring and supervising in the community defendants who receive a personal bond and judges impose additional criminal offenses for defendants' failure to appear or subsequent arrests.⁶² Through its supervision unit, Pretrial Services officers supervise and monitor defendants according to the conditions of release set by the magistrate at their initial hearing.⁶³ All defendants supervised by the agency are required to comply with the following standard conditions of release:

- Check-ins with the agency by telephone at least every two weeks.
- Call-in to the agency the day before court to confirm the court date.
- In-person check-in at the agency's office in the courthouse on the court date.
- Notify the agency of any change in address, telephone number, or employment.
- No travel out of the Harris County area.

⁶¹ Pretrial Justice Institute, "Rational and Transparent Bail Decision Making: Moving from Cash-Based to a Risk-Based Process," (2012), <http://www.pretrial.org/devsite/download/featured/Rational+and+Transparent+Bail+Decision+Making.pdf>.

⁶² Rules of the Judicial District Courts of Harris County, "Rules of the Judicial District Courts of Harris County."

⁶³ Mahoney and Nugent-Borakove, "Harris County Criminal Justice System Improvement Project: Phase 1 Report."

- No contact with a complaining witness.

A judicial officer may chose to set additional or enhanced conditions on the release of a defendant on personal bond, including required urine samples for drug testing, home confinement and electronic monitoring, curfew requirements, and restricted contact with alleged victims or witnesses.⁶⁴ These conditions allow criminal justice system to supervise defendants released from jail pretrial while ensuring the public's safety; however, judges reserve these community-based supervision requirements for defendants released on a personal bond and the majority of defendants that receive personal bonds are low-risk defendants.⁶⁵ By comparison, defendants released on a cash or surety bond are not subject to community-based supervision.⁶⁶ This is a problem because judges in Harris County reserve personal bonds for low-risk defendants who may not otherwise commit future crimes or fail to appear for their court proceedings, indicating the county may be misapplying its resources by supervising defendants released on a personal bond rather than defendants released on a cash or surety bond.

The current supervision requirements included as part of a defendant's personal bond conditions minimizes their risk to public safety; however, personal bonds are rarely granted to Harris County defendants. For example, in 2009, the Harris County judiciary released only 5% of defendants on personal bond while 34.5% of all defendants were released on surety bond.⁶⁷ By 2013, the judiciary released just 4.4% of defendants on a personal bond.⁶⁸ The low frequency with which the county's judiciary grants personal bonds to defendants indicates the judiciary's reliance on a defendant's ability to pay bond

⁶⁴ *Ibid.*

⁶⁵ Harris County Pretrial Services. *2013 Annual Report*.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Harris County Pretrial Services. 2009 Annual Report, <http://www.harriscountytexas.gov/CmpDocuments/59/Annual%20Reports/2009%20Annual%20Report-Rev10-2010.pdf>.

as a means for determining their pretrial release decision, rather than a defendant's risk of flight or of committing an offense before their case is adjudicated.

Chapter 4: Consequences of Pretrial Detention

Research shows there are three primary consequences of pretrial detention⁶⁹: 1) increased likelihood of receiving harsher sentencing outcomes than their non-detained counterparts, 2) the compromised economic capacity of defendants, and 3) exacerbated behavioral health conditions among defendants. Although most defendants admitted to the Harris County Jail are released within hours or days, rather than weeks or months, even a short stay in jail can compromise a defendant's fiscal and human capital.⁷⁰ Detaining low- and moderate-risk defendants is correlated with higher rates of new criminal activity both during the pretrial stage and years after case disposition, increasing the use of beds at the Harris County jail and the operating costs associated with increased utilization rates.⁷¹

INCREASED LIKELIHOOD OF HARSHER SENTENCING OUTCOMES

The pretrial detention of defendants is correlated to less favorable criminal justice outcomes than those who are not detained, regardless of the charge for which they were arrested or their criminal history, increasing the utilization rates of beds at the Harris County Jail and the associated operating costs to taxpayers.⁷² Less favorable outcomes include an increased likelihood of conviction, of being incarcerated following a conviction, and of receiving longer sentences of incarceration than their non-detained

⁶⁹ Lowenkamp, VanNostrand, Holsinger, "Hidden Costs of Pretrial Detention."

⁷⁰ American Bar Association (ABA), Criminal Justice Pretrial Justice Standards, 3 (2007), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.auth_checkdam.pdf.

⁷¹ Lowenkamp, VanNostrand, Holsinger, "Hidden Costs of Pretrial Detention."

⁷² Arthur W. Pepin, "2012-2013 Policy Paper: Evidence-Based Pretrial Release," Conference of State Court Administrators, 2012, http://www.colorado.gov/ccjdir/Resources/Resources/Ref/EBPre-TrialRelease_2012.pdf. Bureau of Justice Assistance, "Ensuring Procedural Justice Throughout the Adjudication Process: Pretrial Reform, High Performance Prosecution, and Smarter Sentencing Practices," 2012, <https://www.bja.gov/Funding/12EnsuringProceduralJusticeSol.pdf>.

counterparts.⁷³ By comparison, defendants who are released pending trial are more likely to have the charges against them dismissed and to receive deferred adjudication.⁷⁴ For example, a recent study found that those defendants, especially low-risk defendants, who remained detained for the entire pretrial period were more than four times more likely to be sentenced to jail and three times more likely to be sentenced to prison than those defendants who achieved pretrial release.⁷⁵ The period between arraignment and trial is recognized as the most critical phase of an individual's case for ensuring a thorough investigation of the facts and testing the State's evidence.⁷⁶ People who are able to post bond and gain pretrial release soon after their arrest are able to build stronger relationships with their attorneys, assist with the defense investigation, and identify potential witnesses.⁷⁷

Pretrial detention is also correlated with a defendant's increased risk of recidivism. The link is especially high for those individuals who have been identified as low- or moderate-risk by a pretrial services agency.⁷⁸ Low- or moderate-risk individuals are often charged with relatively minor offenses. If they cannot afford bond, they often remain in jail regardless of their risk level. However, after spending even just a few days

⁷³ National Association of Pretrial Services Agencies (NAPSA), "NAPSA Standards on Pretrial Release," 2004, <http://www.pretrial.org/download/performance-measures/napsa%20standards%202004.pdf>.

⁷⁴ Texas Fair Defense Project (TFDP), "Depenalizing Poverty: A Proposal for Improving Harris County Bail Policies," 2014, <http://www.texasfairdefenseproject.org/media/Depenalizing-Poverty.pdf>.

⁷⁵ Christopher T. Lowenkamp, Marie VanNostrand, Alexander Holsinger, "Hidden Costs of Pretrial Detention," Laura and John Arnold Foundation (2013), http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_state-sentencing_FNL.pdf.

⁷⁶ Texas Fair Defense Project (TFDP), "Depenalizing Poverty: A Proposal for Improving Harris County Bail Policies," *See also: Powell v. Alabama*, 287 U.S. 45, 57 (1932).

⁷⁷ Texas Fair Defense Project (TFDP), "Depenalizing Poverty: A Proposal for Improving Harris County Bail Policies."

⁷⁸ Lowenkamp, VanNostrand, and Holsinger, "Hidden Costs of Pretrial Detention."

in pretrial detention, these individuals are more likely to engage in new criminal activity.⁷⁹ Returning to jail increases the costs a county spends on the individual.

COMPROMISED ECONOMIC CAPACITY

Pretrial detention of defendants increases the county's criminal justice system costs while reducing the economic capacity of these defendants upon their return to the community due to collateral consequences of confinement such as job loss, inability to pay child support, and eviction.⁸⁰ For many defendants, these collateral consequences eliminate the resources that could otherwise support a reduction in their risk of committing future crimes or of failing to appear for their court proceedings. Therefore, investing in pretrial detention may not yield financial returns to the taxpayers who fund the operation of the Harris County Jail.

Pretrial detention immediately jeopardizes employment. People who remain detained for even just a few days may lose their jobs, and subsequently, their homes, and their vehicles.⁸¹ The loss of even a few days' worth of salary could result in a defendant's inability to pay rent, which could lead to their eviction. The loss may also cause unintended consequences for a detainee's family because they lose the defendant's income, which may be the family's primary or sole income, which could cause the family to lose their housing.⁸² Defendants' children may be forced to move in with other family members or be placed in foster care, regardless of whether the defendant is found guilty

⁷⁹ Lowenkamp, VanNostrand, and Holsinger, "Hidden Costs of Pretrial Detention."

⁸⁰ American Bar Association (ABA), *Criminal Justice Pretrial Justice Standards*.

⁸¹ Ana Yáñez-Correa and Molly Totman, "Costly Confinement & Sensible Solutions: Jail Overcrowding in Texas," 2010, <http://www.texasojc.org/sites/default/files/publications/Costly%20Confinement%20Sensible%20Solutions%20Report%20%28Oct%202010%29.pdf>.

⁸² *Ibid.*

of the crime or is being detained pretrial.⁸³ Therefore, pretrial detention also compromises the economic capacity of defendants' families and their communities.

Defendants' compromised economic capacity affects both their short- and long-term sustainability and self-sufficiency. Individuals who have been detained have trouble finding employment for years after they are released. They work on average fewer hours and make lower wages for as many as fifteen years after their release from detention.⁸⁴ The children of adults with criminal justice involvement also have higher rates of delinquency and are at a higher risk of dropping out of school.⁸⁵ Further, these children are more likely to become involved with the criminal justice system themselves.⁸⁶ These outcomes may lead to generational incarceration and long-term poverty.

EXACERBATED BEHAVIOR HEALTH CONDITIONS

Confinement in a jail can exacerbate defendants' existing or underlying behavior health conditions, increasing the costs to the county jail that is mandated to provide adequate mental health care to inmates, regardless of the number of inmates incarcerated at the jail.⁸⁷ Behavior health refers to an individuals full mental and emotional well-being, including the treatment of mental illnesses and substance use disorder or other

⁸³Sharon Dolovich, "Incarceration American-Style," Georgetown University Law Center, 2009, <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1018&context=facpub>.

⁸⁴ Amanda Petteruti and Nastassia Walsh, "Jailing Communities: The Impact of Jail Expansion and Effective Public Safety Strategies," Justice Policy Institute (JPI), 2008, http://www.justicepolicy.org/images/upload/08-04_rep_jailingcommunities_ac.pdf.

⁸⁵ Helen Gaebler, "Criminal Records in the Digital Age: A Review of Current Practices and Recommendations for Reform in Texas," William Wayne Justice Center for Public Interest Law at the University of Texas School of Law, 2013, http://www.utexas.edu/law/centers/publicinterest/research/criminalrecords_report.pdf.

⁸⁶ *Ibid.*

⁸⁷ United States Department of Justice (DOJ) Civil Rights Division. Letter to The Honorable Ed Emmett.

addictive behaviors.⁸⁸ Nearly 25% of the inmates in the Harris County Jail have a history of mental illness, or require psychotropic medication.⁸⁹ Secure settings with heterogeneous populations, like the Harris County Jail, must prioritize security and provide rehabilitation opportunities to individuals with a wide range of needs while containing costs.⁹⁰ These priorities may not align with the treatment needs of defendants with a behavior health condition. Conditions of confinement, including inadequate staffing, use of force and restraints, and provisions of custodial care, may compromise the ability of prisons and jails to provide integrated treatment to this population of defendants.⁹¹ Without appropriate evaluation and effective treatment, defendants with a behavior health condition incarcerated in the Harris County Jail are likely to deteriorate.

An attendant consequence of incarcerating defendants with a behavior health condition is an increased demand for forensic services. Forensic services include the appropriate mental health and restoration services provided to individuals who are determined to be incompetent to stand trial. Because communities across the state lack appropriately integrated community-based services for adults with co-occurring diagnoses,⁹² defendants who have a high clinical complexity are usually placed in state

⁸⁸ Substance Abuse and Mental Health Services Administration (SAMHSA), “What Is Behavior Health?” <http://captus.samhsa.gov/prevention-practice/prevention-and-behavioral-health/behavioral-health-lens-prevention/1>.

⁸⁹ Dr. Tony Fabelo, Carl Reynolds, and Jessica Taylor, “Harris County Public Defender: Preliminary Report on Operations and Outcomes,” Council of State Governments Justice Center, 2012, <http://tidc.tamu.edu/DGReportDocuments/212-13-D03%20%20HC%20PDO%20Report%20from%20Justice%20Center%2010-19-12.pdf>.

⁹⁰ Heilbrun, K., DeMatteo, D., Yasuhara, K., Brooks-Holliday, S., Shah, S., King, C., Bingham, A., Hamilton, D., Laduke, C. “Community-Based Alternatives for Justice-Involved Individuals with Severe Mental Illness: Review of the Relevant Research.” *Criminal Justice and Behavior* (2012), 39: 351; <http://cjb.sagepub.com/content/39/4/351>

⁹¹ *Ibid.*

⁹² Lamb, H.R., Weinberger, L.E., & DeCuir, W.J. “The Police and Mental Health.” *Psychiatric Services*, 52(10). (2012): 1266-1271; http://www.popcenter.org/problems/mental_illness/PDFs/Lamb_et_al_2002.pdf.

psychiatric hospital for inpatient forensic services.⁹³ Between 2001 and 2010, Inpatient forensic commitments more than doubled, but the number of state hospital beds did not increase over the same period.⁹⁴ Consequently, there is a shortage of beds available in state hospitals for both civil and forensic commitments. Defendants may be held in local jails until a forensic inpatient bed is available, but without appropriate treatment, defendants' extended stays could exacerbate the symptoms associated with their behavioral health condition.

⁹³ Sunset Advisory Commission. "Department of State Health Services: Staff Report." (2014), https://www.sunset.texas.gov/public/uploads/files/reports/DSHS%20Staff%20Report_1.pdf.

⁹⁴ Texas Department of State Health Services. "DSHS Sunset Self-Evaluation Report 2013: Mental Health and Substance Abuse Services. (2013), noting the rate increased from 16 to 37 percent, <http://www.dshs.state.tx.us/sunset.aspx>

Chapter 5: Reform Options

To help ameliorate these three policy issues, Harris County could consider the following reform options: 1) revise the bail schedule (offer more personal bonds), 2) grant defendants earlier access to counsel, and 3) expand and enhance the capacity of the county's Pretrial Services Agency in order to provide community-based alternatives to pretrial detention. This chapter will describe the proposed reform options in more detail and analyze their feasibility for Harris County criminal justice system officials to consider as they seek to address the application of pretrial services to defendants. Each of the three reform options would allow these officials to make data-informed changes to local pretrial case processing that would achieve the desired outcomes of public safety and court appearance results while reserving more jail beds for high-risk defendants and sentenced jail inmates.

OPTION 1: REVISE THE BAIL SCHEDULE

To reduce the number of defendants detained at the Harris County Jail, the District and County Criminal Court judges could revise the bail schedule that the District Attorney's Office and the magistrates use to determine bail for defendants. The Harris County judiciary could revise the bail schedule to abolish bond amounts for non-violent offense categories and to account for the age of a defendant's previous offenses. According to the third edition of the Standards of Pretrial Release by the National Association of Pretrial Services Agencies (NAPSA) and the American Bar Association (ABA), compensated sureties for defendants charged with non-violent offenses should be abolished because they do not protect public safety or assure a defendant will appear at their court proceedings.⁹⁵ Harris County could also consider lowering the presumptive

⁹⁵ National Association of Pretrial Services Agencies (NAPSA), "NAPSA Standards on Pretrial Release,"

bond amounts applicable to individuals charged with misdemeanors and low-level felonies and make increased use of personal bonds.⁹⁶

Federal courts found that bail procedures must be an individualized decision for each defendant.⁹⁷ Harris County's hearing officers could continue to use Pretrial Services risk-assessment reports to inform defendants' bond amounts, and Pretrial Services could continue to supervise defendants who are released after posting bond. The judge should consider the nature of the alleged offense, the defendant's economic capacity, community and family responsibilities, as well as at the potential for flight risk.⁹⁸ Harris County's Pretrial Services Agency could revise its risk assessment tool to ensure that it supports evidence-based pretrial decision-making. An accumulation of empirical research strongly suggests the following points:

- Evidence-based risk assessments have higher predictive validity than clinical or professional judgment alone.⁹⁹
- Post-conviction risk factors relating to recidivism should not be applied in a pretrial setting.¹⁰⁰
- Several measures commonly gathered for pretrial were not significantly associated with pretrial failure: residency, injury to victim, weapon, and alcohol.¹⁰¹

Pretrial Release, Third Edition.

⁹⁶ *Ibid.*

⁹⁷ *Stack v. Boyle*, 342 U.S. 1 (1951).

⁹⁸ *Bandy v. United States*, 364 U.S. 477, 477 (1960).

⁹⁹ Kristin Bechtel, Christopher Lowenkamp, Alex Holsinger, "Identifying the Predictors of Pretrial Failure: A Meta-Analysis," *Federal Probation*, Vol. 75 No. 2, (2011), <http://www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2011-09/identifying.html>.

¹⁰⁰ Cynthia A. Mamalian, "State of the Science of Pretrial Risk Assessment," Pretrial Justice Institute, (2011), https://www.bja.gov/publications/pji_pretrialriskassessment.pdf.

¹⁰¹ Bechtel, Lowenkamp, Holsinger, "Identifying the Predictors of Pretrial Failure: A Meta-Analysis."

- The six most common validated pretrial risk factors are prior failure to appear; prior convictions; current charge a felony; being unemployed; history of drug abuse; and having a pending case.¹⁰²
- Defendants in counties that use quantitative and mixed risk assessments are less likely to fail to appear than defendants in counties that use qualitative risk assessments.¹⁰³
- Not only are subjective screening devices prone to demographic disparities, but these devices produce poor results from a public safety perspective.¹⁰⁴

Harris County could use the statewide pretrial services program in Kentucky as a model for administering a uniform assessment protocol that results in a failure to appear rate of only 10 percent and a re-arrest rate of only 8 percent.¹⁰⁵

Advantages

- ***Increase the likelihood that defendants can afford to post bond:*** A lower bond amount could increase the likelihood that defendants are able to afford their bond amounts, thereby increasing the likelihood that low-risk defendants are released pretrial. The Commonwealth of Kentucky and the State of Wisconsin have prohibited the use of compensated sureties.¹⁰⁶ Illinois and Oregon do not allow release on surety bonds, but do permit deposit bail, so their county jails have not

¹⁰² Mamalian. “State of the Science of Pretrial Risk Assessment,”

¹⁰³ David Levin, “Examining the Efficacy of Pretrial Release Conditions, Sanctions and Screening with the State Court Processing Statistics Dataseries” Pretrial Justice Institute (2007), <http://www.pretrial.org/download/supervision-monitoring/Examining%20the%20Efficacy%20of%20Pretrial%20Release%20Conditions%20-%20Levin%202007.pdf>.

¹⁰⁴ *Ibid.*

¹⁰⁵ Barry Mahoney, Bruce D. Beaudin, John A. Carver III, Daniel B. Ryan, Richard B. Hoffman, “Pretrial Services Programs: Responsibilities and Potential,” National Institute of Justice (2001), <https://www.ncjrs.gov/pdffiles1/nij/181939.pdf>.

¹⁰⁶ Ky. Rev. Stat. §431.510 (2004); Wis. Stat. §969.12 (1994).

realized a similar reduction of defendants.¹⁰⁷ By reforming the bail schedule and bond setting procedures, the District and County Criminal Court Judiciaries could reduce the number of defendants detained at the Harris County Jail due to their inability to post bond.

- ***Increase the likelihood that the county's pretrial practices align with state law:*** Revising the bail schedule could align Harris County's bail practices to the Texas Constitution and Article 17 of the Texas Code of Criminal Procedure. Judges could retain their discretion over the determinations of whether to grant bail, the type of bail granted, mitigating factors, and the amount under Article 17.15 of the state statute.¹⁰⁸

Disadvantages

- ***Risk of releasing high-risk defendants who can afford revised bond amounts:*** A lower bond amount could increase the likelihood that higher-risk defendants are released pretrial based on their ability to post bond, which could compromise public safety. Harris County could mitigate this attendant consequence by coupling an evidence-based risk assessment tool with the proposed revisions to the bail schedule to ensure high-risk defendants are not released by posting an affordable bond amount.
- ***Increased risk of prosecutors using pretrial risk assessment information against the defendant during their court hearings:*** The information Pretrial Services officers collect from defendants could include incriminating information that might otherwise be used against them during their court proceedings. Harris

¹⁰⁷ II. St. Ch. 725 §5/110-7 (2012); Or. Rev. Stat. §135.265 (2011).

¹⁰⁸ Mahoney, et. al., "Pretrial Services Programs: Responsibilities and Potential."

county criminal justice stakeholders could mitigate this risk by ensuring accurate protections of defendants' information.

OPTION 2: EARLIER ACCESS TO COUNSEL

The Harris County judiciary could consider reforming the bond setting procedures to ensure defendants are represented at initial appearance hearings. In 2009, the Harris County Commissioner's Court established the Public Defender's Office.¹⁰⁹ Although the Public Defender's Office provides better defense outcomes than appointed counsel,¹¹⁰ Harris County has not revised its pretrial procedures to ensure defendants' access to counsel at their initial hearing. The Commissioner's Court could require defendants to receive access to counsel at their initial hearing, and establish a program to ensure the availability of defense counsel at initial hearings.

Advantages

- Providing defendants defense attorneys at bail hearings would promote fairness in the Harris County pretrial system. Providing attorneys to defendants at the initial probable cause and bail hearing could limit pretrial detention and improve the fairness of the Harris County pretrial system. According to the Texas Criminal Defense Lawyer's Association, counsel at initial bail hearings is an important factor for reducing the frequency with which judges impose pretrial detention.¹¹¹
- ***Reduce the workload of the county's judiciary and court administrators:*** Defense lawyers present at defendants' initial probable cause hearing can provide

¹⁰⁹ Tony Fabelo, Carl Reynolds, and Jessica Tyler, "Improving Indigent Defense: Evaluation of the Harris County Public Defender," Council of State Governments Justice Center (2013), <http://harriscountypublicdefender.org/wp-content/uploads/2013/10/JCHCPDFinalReport.pdf>.

¹¹⁰ *Ibid.*

¹¹¹ Alex Bunin and Andrea Marsh, "Proposal for Counsel at Tex. Code Crim. Proc. Art. 15.17 Proceedings," (2014), <http://www.voiceforthedefenseonline.com/story/proposal-counsel-tex-code-crim-proc-art-1517-proceedings>.

information to the magistrate relevant to issues of probable cause and bond, reducing the need for subsequent review.¹¹²

- ***Aligns the county's policies regarding access to counsel with federal case law:***

The U.S. Supreme Court held in *Rothgery v. Gillespie County* that a defendant's Sixth Amendment right to counsel begins at the initial hearing.¹¹³ Providing defendants' with legal representation would align the county's policies with federal case law, decreasing the likelihood that the county will be suited over its current pretrial practices.

- ***Improved case outcomes for defendants:*** Defendants' access to counsel at their initial hearing may help them obtain release from custody, decreasing the likelihood of receiving a final conviction or increasing the likelihood that defendants' receive a shorter sentence than they would have otherwise.¹¹⁴

- ***Protection against defendants' self-incrimination:*** This option could reduce the likelihood that defendants' statements are used against them in the prosecution of their cases.¹¹⁵ An attorney could advise the defendant on the legal protocol, including the risk of speaking to the judge directly at their initial hearings.

Disadvantages

- ***Pushback from the county's magistrates and judiciary:*** Because attorneys are familiar with legal procedures, a defense attorney's request for an adjusted bond amount may lead to pushback from hearing officers who want to retain their discretion over pretrial release decisions.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid* at 19.

- **Increased costs to taxpayers:** According to the Harris County Budget Office the attorney's fees for staffing pretrial defense counsel program would cost approximately \$419,000 annually, including administrative costs.¹¹⁶ The State of Maryland's Supreme Court recently ordered the state to provide counsel at initial hearings.¹¹⁷ Since its implementation, the frequency with which judges issue personal bonds has increased by 8%.¹¹⁸ Harris County could assume similar cost savings.¹¹⁹

OPTION 3: ENHANCE AND EXPAND COMMUNITY-BASED ALTERNATIVES

The Harris County judiciary could increase the number of no-cost personal bonds judges grant defendants by establishing a pilot program that offers personal bonds at a higher rate and maintains an appropriate level of supervision of moderate-risk defendants. County stakeholders could use evidence-based practices for implementing effective, tailored bond and supervision approaches that are appropriate to a defendant's risk-level that have shown to save taxpayer dollars and safely address high pretrial populations in other jurisdictions. These include using electronic reporting and notification systems that are centered in kiosks throughout the county, day reporting centers for moderate risk defendants, and use of electronic home confinement with GPS monitoring.¹²⁰ The use of

¹¹⁶ Texas Fair Defense Project (TFDP), "Depenalizing Poverty: A Proposal for Improving Harris County Bail Policies."

¹¹⁷ Ian Duncan, "First defendants get lawyers at bail hearings in Maryland", *The Baltimore Sun*, 1 July 2014, http://articles.baltimoresun.com/2014-07-01/news/bs-md-bail-lawyers-arrive-20140701_1_douglas-colbert-court-system-lawyers.

¹¹⁸ Texas Fair Defense Project (TFDP), "Depenalizing Poverty: A Proposal for Improving Harris County Bail Policies."

¹¹⁹ *Ibid*, noting If the increase in the issuance of personal bonds had even a minimal impact and reduced the jail's pretrial population by 300 individuals (which is *less than 5%* of the pretrial population), Harris County would save \$22,500 per day or \$8.2 million per year.

¹²⁰ *Ibid*.

a pretrial risk assessment, as described in Option #1, can inform the conditions set on defendants released on a personal bond.

Advantages

- ***Pretrial supervision could accomplish the purpose of bail, ensuring defendants appear in court and do not commit new crimes, without the human costs of pretrial detention:*** Individuals receiving supervision are much more likely to appear in court than those who do not receive supervision.¹²¹ Pretrial supervision for longer periods of time also has been linked to a decrease in new criminal activity.¹²² A recent study found that pretrial supervision decreased the likelihood that defendants would fail to make a court appearance, especially for defendants designated high-risk by the pretrial screening process.¹²³ In 2012, defendants who were on personal bond and under pretrial supervision in Harris County made 94.2% of their collective court appearances.¹²⁴ This appearance rate is comparable to the appearance rates reported for defendants released on surety bond.¹²⁵
- ***Increasing the number of personal bonds granted to may reduce the likelihood of defendants' rate of pretrial misconduct:*** According to a recent study, less than 4% of Harris County defendants released on a personal bond, and less than 6% fail to appear at their court proceedings, indicating the current program structure

¹²¹ Christopher Lowenkamp and Marie VanNostrand, "Exploring the Impact of Supervision on Pretrial Outcomes," Laura and John Arnold Foundation (LJAF) (2013), http://arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_Supervision_FNL.pdf.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ Harris County Pretrial Services. *2012 Annual Report*.

¹²⁵ Thomas H. Cohen and Brian A. Reaves, "Pretrial Release of Felony Defendants in State Courts," Bureau of Justice Statistics Special Report (2007), <http://www.bjs.gov/content/pub/pdf/prfdsc.pdf>.

is successful at releasing defendants pretrial.¹²⁶ Expanding and enhancing this program to serve a larger number of defendants could increase success rates.

- ***Increased likelihood of addressing social service needs:*** The pretrial period of criminal justice processing is unique in that for most people it is brief and the outcome is uncertain. Yet, it represents an opportunity to identify those who could benefit from substance abuse treatment and begin to engage them in the process. Providing effective services at this early stage of involvement with the criminal justice system can result in heightened motivation to seek treatment and decreased recidivism.¹²⁷

Disadvantages

- ***Net-widening effect:*** Pretrial defendants that participate in the proposed pretrial supervision program may eventually be found not guilty. Participating in the program may have required unnecessary supervision of an innocent person.

¹²⁶ Gerald R. Wheeler and Gerald Fry, “Harris County’s Two-Tier Justice System: Longitudinal Study of Effects of Harris County Felony and Misdemeanor Defendants’ Legal and Extralegal Attributes on Pretrial Status and Case Outcome,” (2014), <http://www.pretrial.org/download/research/Harris%20County%27s%20Two-tier%20Justice%20System%20%28Project%20Orange%20Jumpsuit%29%20-%20Wheeler%20and%20Fry%202014.pdf>.

¹²⁷ Substance Abuse and Mental Health Services Administration (SAMHSA), “Substance Abuse Treatment for Adults in the Criminal Justice System,” 2007, <http://www.ncbi.nlm.nih.gov/books/NBK64137/pdf/TOC.pdf>.

Conclusion

A financial-based bail schedule, a lack of access to defense counsel, and a lack of community-based alternatives to supervision impedes the ability of judges to make risk-based pretrial release decisions for defendants arrested in Harris County. As elected public officials, Harris County judges need to ensure the public's safety by considering defendants' risk of committing future crimes and failing to appear for their court proceedings. However, the current pretrial justice system is not providing appropriate risk assessment or supervision to defendants according to their risk-level. In order to address the three policy issues identified in this report, Harris County officials can make data-informed changes to local pretrial case processing that would achieve the desired outcomes of public safety and court appearance results while reserving more jail beds for high-risk defendants and sentenced jail inmates.

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